



NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rule Exempting an Amended System of Records From Certain Provisions of the Privacy Act

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

SUMMARY: The National Labor Relations Board (NLRB) exempts a new system of records, NLRB iTrak and Banned Entry List, from certain provisions of the Privacy Act of 1974, pursuant to sections (k)(1), (2), and (5) of that Act.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further action, unless adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If adverse comment is received, the NLRB will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency regarding the rule shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570-0001, or submit them electronically to privacy@nrlb.gov. Comments may also be submitted electronically through <http://www.regulations.gov>, which contains a copy of this rule and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Prem Aburvasamy, Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE., Third Floor, Washington, DC 20570-0001, (202) 273-3733, privacy@nrlrb.gov.

SUPPLEMENTARY INFORMATION: Elsewhere in this issue of the Federal Register, the Agency has announced a new system of records, NLRB-34, NLRB iTrak and Banned Entry List, pursuant to the Privacy Act of 1974, 5 U.S.C. 552a.

Pursuant to subsections (k)(1), (2), and (5) of the Privacy Act, and for the reasons set forth below, the Board includes within 29 CFR 102.119 additional paragraphs (q) and (r), exempting portions of the amended system of records (NLRB-34) from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act.

Subsection (k)(1) of the Privacy Act authorizes the head of an agency to exempt a system of records from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act (5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), (f)) (hereinafter, “the applicable subsections”) if records are properly classified pursuant to an Executive order, within the meaning of section 552(b)(1) of the Freedom of Information Act.

Subsections (k)(2) and (5) of the Privacy Act, in combination, authorize the head of an agency to exempt a system of records from the applicable subsections if records are created or maintained for the purpose of law enforcement (other than material within the scope of subsection (j)(2) of the Privacy Act), as well as determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in

confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. As indicated in the Agency's accompanying Privacy Act system of records notice issuing NLRB-34, this system contains information compiled by the Agency in the course of carrying out its security responsibilities.

The requirements of the applicable subsections, if applied to the system of records NLRB-34, would substantially compromise the ability of the Agency's Security Branch staff to effectively conduct investigations concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and contract positions at the Agency, in addition to determining the appropriate level of access to the Agency's facilities. For instance, the disclosure requirements as set forth in the provisions for notice, access, amendment, review, and accountings could enable subject individuals to take action to jeopardize the physical safety or anonymity of confidential sources used during investigatory proceedings. Additionally, the disclosure of information gathered during a security investigation may unreasonably weaken the interests of protecting properly classified information and the objectivity of certain examination materials.

This rule relates to individuals rather than small business entities. Accordingly, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, this rule will not have a significant impact on a substantial number of small business entities.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Agency has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements on the public.

The rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among levels of government. Therefore, it is determined that this rule does not have federalism implications under Executive Order 13132.

In accordance with Executive Order 12866, it has been determined that this rule is not a “significant regulatory action,” and therefore does not require a Regulatory Impact Analysis.

List of Subjects in 29 CFR Part 102

Privacy, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the NLRB amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

1. The authority citation for part 102 is revised to read as follows:

Authority: 29 U.S.C. 151, 156. Section 102.117 also issued under 5 U.S.C.

552(a)(4)(A), and § 102.119 also issued under 5 U.S.C. 552a(j) and (k). Sections 102.143 through 102.155 also issued under 5 U.S.C. 504(c)(1).

Subpart K—Records and Information

2. Section 102.119 is amended by revising the section heading and adding paragraphs (q) and (r) to read as follows:

§ 102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

* * * * *

(q) Pursuant to 5 U.S.C. 552a(k)(1), (2), and (5), the system of records maintained by the NLRB containing NLRB iTrak and Banned Entry List records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive order, within the meaning of 5 U.S.C. 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2); and

(3) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified information.

(r) The Privacy Act exemptions contained in paragraph (q) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) iTrak and Banned Entry List records may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal

agency. Application of exemption (k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d), which would pose a risk of harm to national defense and foreign policy interests.

(iii) iTrak and Banned Entry List records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2).

Application of exemption (k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d), which would pose a risk of harm to law enforcement interests. Specifically, this exemption is necessary to safeguard the integrity of law enforcement investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, this exemption reduces the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(iv) Exemption (k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. This exemption is necessary to safeguard the integrity of security investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, this exemption reduces the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by Executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of security investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference or influence, and psychological conditions, that are relevant to future security determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record, and how to contest its content. Since this system of records is being exempted from subsection (f) of the Privacy Act concerning agency rules, and subsection (d) of the Privacy Act concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (d) and (f) of the Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record pertaining to that individual. The application of this provision could compromise the progress of a law enforcement investigation regarding security and impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

Dated: November 13, 2020.

Washington, DC

By direction of the Board

Roxanne L. Rothschild,

Executive Secretary,

National Labor Relations Board,

